

INFORMATION SHEET FOR AIS NSW MEMBER SCHOOLS

DUTY OF CARE

What duty of care does a school owe its students?

1. In Australia, a person owes a duty of care to others to not cause injury as a result of their negligent act or omission. This duty does not normally extend to taking positive steps to prevent an injury to another person.
2. The nature of the duty as it applies in New South Wales has now been set out in legislation. The *Civil Liability Act 2002* ('**Civil Liability Act**') applies in relation to any claim for damages for personal injury, death, damage to property or economic loss resulting from negligence. The Civil Liability Act provides that a person is not negligent in failing to take precautions against a risk of harm unless:
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); **and**
 - (b) the risk was not insignificant; **and**
 - (c) in the circumstances, a reasonable person in the same position would have taken those precautions.
3. However, the law also imposes a special duty on certain categories of relationships, giving rise to more onerous duties. The relationship between a school and its pupils is one such relationship. A school has a duty to **ensure** that reasonable steps are taken to prevent harm to students. This is a positive duty - that is, it requires that positive steps be taken.
4. The courts have said '*the reason underlying the imposition of the duty would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that during school hours the child is beyond the control and protection of his parents and is placed under the control of the school master who is in the position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury*'.
5. This does not mean that the school is under an obligation to **ensure** that its pupils never suffer injury, but that the school **must take reasonable steps** to prevent the children being harmed.
6. The duty of care owed by a school to its students has been held by the courts to be a non-delegable duty. This means that the school can not discharge the duty simply by putting a responsible third party, such as a teacher or a third party provider, in charge. A school always has a responsibility to ensure that reasonable steps are taken for the safety of its students. This does not, however, mean that the school need always take these steps itself. It may be sufficient for the school to satisfy itself that the appropriate steps are being taken by others.
7. A school will be held to be in breach of its duty of care if a student is injured and the student can show that:
 - (a) the risk of harm was foreseeable;

- (b) precautions should have been taken against the risk because it was '*not insignificant*' (for example, it was not far fetched or fanciful);
 - (c) causation - the precautions which should have been taken would have prevented the harm (that is, the failure to take precautions caused the harm); and
 - (d) it is **reasonable** to require the school to take the precautions taking into account:
 - (i) the probability that the harm would occur;
 - (ii) the burden of taking the precautions;
 - (iii) the seriousness of the harm; and
 - (iv) the burden of taking precautions to prevent other, similar, harm.
8. As the Civil Liability Act is relatively new legislation, there have not yet been many cases in which the scope of its application has been set out by the Courts. This is particularly the case in relation to cases involving schools. This is where the case law becomes important.
9. Australian law is a mix of common law (the judge-made law which is found in court decisions, and is a product which has evolved historically) and legislation (the Acts of Parliaments). In general, legislation takes precedence, so if there is a clash or inconsistency between the two, legislation will prevail. However, common law exists as a kind of back-up, and fills in the inevitable gaps left by legislation. Common law also records the interpretation of legislation.
10. This information sheet sets out some of the elements of a school's duty of care to its students taken from the case law. At the end of the information sheet are some case examples of the principles.

What is a foreseeable risk?

- 11. A foreseeable risk is one which a reasonable person in the position of the defendant would have foreseen constituted a real risk to the plaintiff or to a limited class of persons of which the plaintiff was a member (for example, a particular student, or a group of students).
- 12. A school will not be liable unless a plaintiff can establish that the school ought to have foreseen that the negligent action of the school might endanger the plaintiff.

What is causation?

- 13. In order to succeed against a school, a plaintiff must show that the negligent acts of the school **caused** the injury. The plaintiff must be able to point to steps that the school could have taken that would have prevented the injury.
- 14. The necessary causal link was unable to be established in *Getani v The Trustee of the Christian Brothers* (1988). In this case, a student was injured when, running through the corridor, he tripped over a school bag. This was despite the fact that the school had instructed pupils to leave bags on top of lockers and not in the corridor, and pupils were

also instructed not to run. Disciplinary measures were taken when pupils breached these instructions. The court held that although the accident was foreseeable, the plaintiff failed to prove that taking preventative steps - such as better supervision or alternative storage facilities - would have prevented the risk of his injury.

15. In *Australian Capital Territory Schools Authority v El-Sheik* (2000) the school was not liable for a student's injury sustained at school because the student failed to establish that the injury was caused by the school's failure to provide adequate supervision. The student was kicked in a short 'play fight' at lunch time and suffered severe injuries because of a congenital syndrome which made him more prone to bleeding. The school did not know about the congenital syndrome. The court held that the congenital syndrome did not raise the standard of care expected of the school because a school authority must take reasonable care having regard to the information that it actually or constructively knows. There had been nothing unusual about this particular playground incident, and the plaintiff had failed to prove that the incident would have been avoided if there had been greater supervision.

What other factors should be taken into account in determining whether it is reasonable to take steps to avoid a risk?

16. In addition to the matters listed in **paragraph 7(d)** above, in the case of schools, the court, in determining whether the steps taken by a school to avoid a risk were reasonable:
- (a) must take into account the burden not only of avoiding a particular risk of harm, but the burden, of taking precautions to avoid a similar risk of harm for which the person may be responsible;ⁱ
 - (b) must take into account the fact that the steps a school is able to take are limited by the financial and other resources that are reasonably available to the school for the purposes of exercising its functions. The steps required to be taken by a school are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate); and
 - (c) must have regard to evidence from the school that it complied with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions.ⁱⁱ

What is the scope of the duty of care?

17. Whether or not a school has discharged its duty of care will depend on the particular circumstances in each case. This means that it is difficult to set out precisely the scope of a duty of care or how a school may discharge its duty of care. However, some guidance can be provided as to the scope of a school's duty of care. The information provided is by no means exhaustive.
18. A school will generally have a duty of care in relation to its students in respect of activities engaged by students at school or activities engaged in by students outside school, but which are facilitated by the school.

Supervision

19. While students are on school premises, school authorities and teachers owe students a duty of care of general supervision concerning their physical safety.
20. General principles in relation to supervision are as follows:
 - (a) Constant supervision is not required.
 - (b) A greater degree of supervision is required where there is actual or constructive knowledge of a dangerous situation.ⁱⁱⁱ
 - (c) The appropriate level of supervision depends on the activities in which students are involved. For example, greater supervision is required in an areas of a playground with dangerous playing equipment such as a flying fox, than in other areas of a playground.^{iv}
 - (d) Inexperienced relief teachers should not be permitted to supervise the use of dangerous equipment at the school (eg science and wood working equipment).^v
 - (e) The mere fact of an accident occurring at school does not mean the school authority is liable. A school is not liable for a foreseeable injury sustained by a pupil under its supervision where that injury is caused by unfortunate circumstances that reasonable precautions would not have prevented. Thus for example, schools have not been held liable where:
 - (i) during a sport class a student unexpectedly, and contrary to safety instructions given by the teacher, swung his hockey stick and struck another boy in the throat, as the school had provided adequate instructions and supervision in the circumstances;^{vi} or
 - (ii) a student was injured while running in the playground, even though the supervising teacher had not observed him running.^{vii}
 - (f) A school is not required to force a pupil to accept assistance in circumstances where a pupil is mature enough to make decisions about his capabilities.^{viii}
 - (g) Schools must, in setting out supervision arrangements, factor in the likelihood that large numbers of children, if left to their own devices, will be engaged in risky activities.

Sports

21. Sports are an important part of school life, but can lead to an increased risk of injury. Schools should be vigilant to ensure that sporting activities are properly supervised and, as far as possible, supervised by appropriately qualified teachers.
22. Just as in the playground, dangerous activities should be prevented and school authorities should ensure students are aware of, and follow the rules.
23. Schools must also take account of, and distribute, information that could prevent injuries.^{ix}

24. It would be prudent for a school to take account of what it knows about students before allowing them to play sport. If the school is concerned that a student is not fit to participate in a particular activity, the school could require the student to obtain a medical clearance from a doctor or physiotherapist before participating in the sport.
25. A school and its teachers have a duty to ensure that its fields and sporting equipment pose no danger to its students. A school also has a duty to ensure that any fields upon which its students play (whether owned by the school or by some other authority) are fit and safe for that purpose.
- 25.1 If pupils play inter-school competitions, then the issue of shared responsibility may arise. Just as a school cannot delegate its duty to its teachers, it cannot abdicate that duty to another school.
26. A school also owes a duty of care to the students of another school playing upon its premises. A school must ensure its fields are safe for all who play on them.
27. A school should give a risk warning under the Civil Liability Act in relation to sporting activities in which students participate. (For more information - see separate Information Sheet relating to risk warnings.)
28. For more information about Sports generally see the separate Information Sheet.

Before and after the school bell, travelling to and from school, the bus stop

29. The duty of care owed by school authorities and staff is normally confined to school hours. However, more and more exceptions seem to have been developed recently, and the law is shifting to a stricter approach when it come to liability outside school hours and grounds. The general rule is that once children have left the school premises, no duty of care exists on the part of the school authority or its teachers **unless it has been voluntarily assumed**.
30. A duty of care may even arise before the morning bell has rung or before the first teacher is on morning playground duty, if children have been allowed to congregate on the school playground with the knowledge of the principal.^x A school must therefore carefully consider the extent to which supervision is required before and after school in order to discharge its duty of care
31. A school must provide adequate supervision on transport to and from school when that transport is provided by the school.^{xi}
32. Where students travel on public transport, whether the school owes a duty of care depends on the circumstance and the knowledge of the school. If the school has knowledge of a particular risk to students, it may be obligated to take steps to prevent harm to those students.^{xii}
33. If the school were aware that:
 - (a) a particular bus driver, who transported its children, was a dangerous driver;
 - (b) that on a particular journey older children habitually and violently bullied younger children;
 - (c) of a busy and dangerous road outside the school; or

- (d) that pupils have been habitually accosted at a certain place along the route to school,

the duty may well extend so far as to require the school to take preventative steps or to warn parents.

Excursions

34. Schools owe students on excursion a duty of care. As a school's duty of care is non-delegable, a school does not discharge its duty of care by placing students in the control of an excursion provider.
35. However, this does not mean that a school can never permit its students to participate in excursions operated by others. Rather, a school must be vigilant to ensure that excursion providers with whom it deals are competent and safe.
36. If the school or teacher becomes aware of a risk to its students in the course of the excursion, the school or teacher should take steps to eliminate or minimise that risk.
37. A school does not have a duty to inspect all of the equipment used in the course of an excursion itself to ensure that it is safe. It is sufficient that it appears to be safe.^{xiii}
38. In determining the extent of a school's duty of care, regard must be had to the purpose of the excursion. For example, on a leadership camp, students must be given *'room for initiative and opportunity to display commonsense and co-operation, as well as room to allow observation of their absence'*^{xiv} provided that there was no obvious risk of significant harm.
39. Risky activities need not be avoided, provided that proper precautions and safety measures are implemented.^{xv}
40. For more information see separate Information Sheet regarding Excursions.

Exchange programs

41. Many schools are involved in exchange programs for students, often with 'sister/brother schools' in overseas countries. Frequently, the school authority has little or no say in the host families chosen for students by the sister/brother school.
42. There may be circumstances in which the school could be found liable in respect of an exchange program. The extent of this liability will depend on the precise circumstances surrounding the program, including the terms of the agreement between the schools and the information given to parents and students about the program.
43. It should be noted that the more a school seeks to retain rights to control the behaviour of students while on exchange, the more likely the school will be found to be assuming additional obligations or making representations as to the level of knowledge the school expects to have in relation to a student's activities while on exchange.
44. For more information see separate Information Sheet on Exchanges.

Bullying

45. School bullying has been recognised as a serious problem in schools in Australia. In addition bullying is becoming an increasingly important public policy issue, following concern about the negative effects of bullying on pupils' academic attainment and emotional well being. The duty of a school extends to protecting a student from the conduct of other students or strangers and from the student's own conduct.
46. To date, there has been no decision in Australia concerning the liability of a school for bullying by students. However, the problem of bullying is now well enough recognised for it to be reasonable to expect all schools to:
- (a) have policies and practices in place to deal with bullying; and
 - (b) ensure that these policies are put into practice.
47. Without such policies and procedures it is more likely that the school will be found to have failed in its duty of care to a student who suffers compensable harm as a result of bullying.
48. Liability will only attach to a school where the student can show that, on the balance of probabilities, the steps proposed by the student would have been effective in preventing or reducing the bullying.

Injuries to teachers

49. A school owes a duty of care to an employed member of professional staff including to protect them from the dangerous behaviour of students. An employer's duty to its employees, like a school authority's duty to its students, is non-delegable.

Injuries to third parties

50. A school owes a duty of care to third parties in and around the school grounds or other areas where school activities take place to take reasonable care to ensure that students do not cause harm to third parties.

Obvious or inherent risks

51. The provisions of the Civil Liability Act mean that:
- (a) a school does not owe a duty of care to warn another person of an obvious risk (being a risk that in the circumstances would have been obvious to a reasonable person in the position of the injured person even if it has a low probability of occurring);^{xvi} and
 - (b) a school is not liable for harm suffered as a result of the materialisation of an 'inherent risk' (being a risk that cannot be avoided by the exercise of reasonable care and skill).^{xvii}

Resource allocation

52. A school can be in breach of its duty of care by failing to allocate resources to, for example, the engagement of sufficient staff, training and maintenance of equipment.

53. The following can be a breach of the duty of care:
- (a) failure to engage sufficient staff to safely conduct a school;
 - (b) failure to send sufficient teachers on a school excursion;
 - (c) failure to devise a safe system of playground supervision;
 - (d) failure to properly train staff;
 - (e) failure to purchase and maintain safe playground equipment.

Recreational activities and risk warnings

54. A school will not be liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person.^{xviii} This principle applies whether or not the person was aware of the risk. A '*dangerous recreational activity*' means a recreational activity^{xix} that involves a significant risk of physical harm.
55. A school does not owe a duty of care to a student or other person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the student or other person.^{xx}
56. Risk warnings:
- (a) need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk). While this statement from the Civil Liability Act is unclear, the more accurate and targeted the risk warning, the better;
 - (b) must be given by or on behalf of the school to be effective; and
 - (c) must be given to both students and parents (although the school need not prove that the students or parents actually received the warning, simply that it was delivered in a manner reasonably likely to result in people being warned of the risk before engaging in the recreational activity).
57. It is important to note that the provisions of the Civil Liability Act make it clear that a school is not entitled to rely on a risk warning if a student was required to engage in the recreational activity by the school. Accordingly, a risk warning cannot be effective in relation to compulsory school activities.
58. For more information see separate Information Sheet on Risk Warnings.

PREVENTATIVE STEPS

59. Considering the nature of children to injure themselves and the limited benefit of parental indemnity, what can schools do to protect themselves?
60. **Creating a safe environment:** Schools and teachers should be meticulous about ensuring that the school environment is a safe and danger-free one. School grounds and buildings should be properly maintained, safety-checked regularly, and be free of

spillages and dangerous toys. Dangerous toys and implements should be discouraged and confiscated if found to be present. Dangerous chemicals should be clearly labelled and locked away.

61. **Supervision:** Children should be supervised as continually as possible. Teachers must be competent (particularly in relation to science and physical educational activities) and must provide appropriate supervision of pupils. Any safety manuals or guidelines should be carefully followed.
62. **Insurance:** Unfortunately, even with the best preventative measures, injuries will happen. It is not possible to prevent claims, but adequate insurance will ensure that the interests of the school, the teachers and its pupils are protected.
63. **Communication:** In order to take advantage of the provisions of the Civil Liability Act, schools should share information with one another as to the approaches adopted to manage the risks facing pupils. This information could assist a school in establishing that there was no breach of its professional duty.
64. **Risk warnings:** Where appropriate, a school should issue risk warnings in relation to recreational activities engaged in by students.
65. **Instruction:** Students should be clearly and regularly warned not to engage in specified behaviour which is considered to be dangerous or risky.

ⁱ Section 5C of the Civil Liability Act

ⁱⁱ Section 42 Civil Liability Act

ⁱⁱⁱ Examples of knowledge of 'dangerous situations' which might require a higher degree of supervision are:

- knowledge that students have/are using dangerous equipment (*Johns v Minister of Education* (1981) 28 SASR 206 - catapults; *Victoria v Bryar* (1970) 44 ALJR 1745 - pipe pellets fired by elastic bands)
- knowledge that sporting equipment had been left out, unsupervised (*Bills v South Australia* (1982) 32 SASR 312 - in this case trampolining equipment was not put away after a lesson; *Gee (aka Michaels) v State of NSW* [2001] NSWSC 1159 - in this case a softball bat was put out in preparation for a lesson involving 9 year old pupils)
- knowledge of a risk in an area where students are playing, for example the risk of a cricket bat getting caught in a metal grille over a drain in the middle of a path being used by students as a cricket pitch (*Vandescheur v State of NSW* [1999] NSWCA 212)
- knowledge that a fight is to occur between students (*Griffin v State of NSW* [2002] NSWSC 1273 - in this case notice of the fight was written on a blackboard in a classroom)

^{iv} *Hadba v The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School)* [2003] ACTCA 25

^v *Parkin v Australian Capital Territory Schools Authority* [2005] ACTSC 3 - in this case a year 8 pupil was injured in a woodworking accident in the course of using a piece of woodworking machinery inappropriately. On the day of the incident the class was supervised by a relief teacher, who was generally inexperienced in the use of the equipment. The court held that to permit the class to go ahead in the absence of the regular teacher, under the control of an inexperienced relief teacher, rather than an experienced woodwork or technical teacher (taking into account that there were others on the staff at the school) was an inadequate response to the risk and a breach of the duty of care.

^{vi} *Trustees of the Roman Catholic Church, Archdiocese of Sydney v Kondrajan* [2001] NSWCA 308

^{vii} *State of NSW v Finnan* [2004] NSWCA 314 - in this case it was important that: regular announcements, at least weekly, about not running in the quadrangle were made by the school; the student had been warned previously not to skylark in the playground; the student was running as fast as he possibly could to escape the dead arm and was probably only running for about 10-15 seconds; the student was aware that there were usually teachers supervising in the canteen and quadrangle; the student was aware that what he was doing was dangerous and silly thing to do, and he could hurt himself; and that it was the supervising teacher's practice to stop students from running in the quadrangle when she observed it taking place.

^{viii} *Van Donselaar v Central Coast Grammar School Limited* [2003] NSWCA 241 - in this case, a school was not liable when a student, who was on crutches, fell on some steps while making his way between classes. The Court held that the student was old enough to make an appropriate decision as to whether he could move around the school, including negotiating the steps, on his crutches. The school had offered him assistance on more than one occasion, which he had declined each time, insisting that he was managing.

^{ix} *Watson v Haines* [1987] Aust Torts Reports 68, 553 (SC NSW), (The Long Thin Neck case) - in this case a school received medical advice concerning the hazards of playing rugby when players have long thin necks. The expert medical authority had offered to make 300 kits available to schools to educate teachers and students of the risks of a boy with a long thin neck playing hooker. The school placed only a third of kits in resource centres and did not advertise their availability. In this case, the plaintiff had a long thin neck and was rendered quadriplegic while playing hooker. The school was held liable for failing to take appropriate steps to implement an adequate system of reducing the risk of injury in rugby, thus allowing the student with a long thin neck to play in the front row of a rugby scrum.

^x *Geyer v Downs* (1977) 138 CLR 911 - in this case a student was injured at 8.50am, ten minutes before the commencement of the school day. Teachers were not rostered on for school duty until 9.00am, but the headmaster had elected to open the school gates at 8.15am to allow children early access to the playground. The headmaster unsuccessfully discouraged the early arrival of children, but decided that opening the grounds was a better alternative than children playing outside on the busy street. He expressly forbade children from playing games and instructed them to talk, read or study. The Court found that a relationship between headmaster and pupil existed at the time of the accident and that the headmaster had 'created a factual situation in which he was under a duty to ensure that there was adequate supervision of the girls in the playground before 9.00am.'

^{xi} *Shrimpton v Hertfordshire Shire Council* (1911) 75 JP 201

^{xii} Compare:

- *Stokes v Russell* (Tas SC, Cosgrove J, 18 January 1983, unrep). A 9 year old student who each day walked with a group of 15 other students to a bus stop 150 metres away from the school entrance to catch a public bus was injured when he ran towards an open door of the bus and tripped while attempting to grab the handles near the door. The Court held that the school did not owe a duty of care to the student because the 'bus stop was a 'considerable distance' from the school grounds and 'the bus was a scheduled

public passenger bus, which the children's parents chose for their children to use, and to use unsupervised'; and

- **Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman** (1996) Aust Torts Reps 81. A 12-year-old pupil of a primary school travelled home from school each day by catching a school bus at a bus stop situated outside a high school and about 350 metres from his own school. He taunted several high school pupils from the top of a tree and they retaliated by throwing sticks at him, injuring his eye. Here the Court held that the school owed the plaintiff a duty of care because the school had actual or constructive notice that some of its students were catching the school bus from that bus stop. The large group of pupils congregating at the bus stop created a risk of '*propensity for mischief*' such that it was reasonably foreseeable that a primary school student might be injured.

^{xiii} **Brown v Nelson** (171) 69 LGR - A student was injured at an Outward Bound camp after a rusty cable supported by rope broke. The school had sent its pupils on courses run by Outward Bound for many years prior to the accident. Unbeknown to the school, the Outward Bound organisation had ceased operating the course but an instructor continued to run the course on the old site. It was held that the school was not liable as the equipment was apparently safe and was used by the students under the supervision of an apparently competent and careful person. The school had no duty to inspect the equipment and satisfy itself as to safety.

Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No.1) [1999] NSWCA 75 - A student was injured using a waterslide at Cateract Scout Park when he slipped and fell forward onto the slide and down into the water. As a result, his teeth were badly damaged. The group of 15 pupils were accompanied by two schoolteachers at the time, but they were not given any detailed instructions as to how to use the slide. The school was found not liable as: the slide was not inherently dangerous; the Trustees could not have taken any other action than that which they already had taken, particularly as they were not the owner of the site; and even if a teacher had been placed at the head of the queue to seat pupils properly on the slide, the injury may still not have been prevented. The Court held that the injury simply resulted from an accident.

^{xiv} **Gugiatti v Servite College Council Incorporated** (2004) Australian Torts Reports 89-724

^{xv} **Regan v Australian Capital Territory Schools Authority** [2003] ACTSC 47 (13 June 2003) - A year 10 student was injured while abseiling as part of her outdoor education class. The injury occurred as she was descending, when there was some sideways movement of the descent rope creating a degree of momentary slackness which caused her to lose her footing. The school was not held liable as: the student had, prior to the day's excursion, received adequate and appropriate training at the school on the principles involved in both rock climbing and abseiling, including practising on a rock wall constructed in the gym and had been appropriately instructed on the day; teachers present on the excursion were appropriately qualified and experienced and provided adequate and appropriate supervision in relation to the safety measures needed for abseiling including the setting up of the ropes. The equipment was all in good working order, the teachers provided close supervision of the descent and the outdoor education manual was followed.

^{xvi} Section 5H of the Civil Liability Act

^{xvii} Section 5I of the Civil Liability Act

^{xviii} Section 5L of the Civil Liability Act

^{xix} A 'recreational activity' is defined as: any sport (whether or not the sport is an organised activity), any pursuit or activity engaged in for enjoyment, relaxation or leisure, or any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or any pursuit or activity for enjoyment, relaxation or leisure.

^{xx} Section 5M of the Civil Liability Act